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One cannot conceive truth without the madness of the law

—J. Derrida

ONE of the main preoccupations of American constitutional law scholarship continues to be the justification of judicial review in the liberal democratic tradition. Writers of the left, right, and center continue to grapple with the countermajoritarian implications of judicial review.[1] This Article attempts to redefine and clarify the debate by examining some of the premises of both the liberal tradition and its leftist critics.[2]

Most attempts to legitimize judicial review have focused primarily on institutional or structural concerns. While many attacks on judicial activism have come from those opposed to the substantive outcome of court decisions, the primary theoretical focus of discussion among scholars has been the proper *role* of courts. Substantive and structural motivations are often inextricably entwined, but they remain conceptually distinguishable. The assumption of the present debate in law is that results are unimportant. For these scholars, the issue continues to be not *what* should be decided, but *who* should decide; certain results can

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Several colleagues have commented on earlier drafts of this Article. All blame must be attributed to them. The credit is entirely my own.

1. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); P. BOBBITT, CONSTITUTIONAL FATE (1982); J.H. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter cited as Brest, *The Misconceived Quest*]; Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

2. This Article shall not address theories commonly associated with the political right. Conservative attempts to limit judicial review to a search for "original intent" have been debunked in both theory and practice. *See* Brest, *The Misconceived Quest*, *supra* note 1. For a discussion of original intent, see *infra* text accompanying note 97.

be legitimated only if the proper branch of government can claim responsibility. The *what*, in other words, is contingent upon the *who*.

Such a debate is false and misleading. The concern of scholarship and politics must be truth, not structure. Yet an understanding of the developments of liberal theory which have defined the contours of the debate is essential to the goal of establishing truth as the real focus of our practice.

The primary concern of liberalism in the area of judicial review has been with the preservation of a decisionmaking hierarchy. The battle has taken place between defenders of Congress's decisionmaking authority and defenders of that of the courts. This confrontation has been falsified, however; it confuses means with ends. Rather than expressing concern for the questions of substance raised at the level of constitutional adjudication, liberal legal theory has satisfied itself with a stunted inquiry into the relations between two branches of the state apparatus. This is the fundamental error of liberal discussions of the role of judicial review. It is an error which is repeated in the ideas of theorists as seemingly diverse as Alexander Bickel, Charles Black, and Ronald Dworkin. These scholars, while representing a wide spectrum of liberal thought, are betrayed by an almost single-minded emphasis on hierarchy.

A better, indeed a truer, ground for concern is the validity of each constitutional decision on its merits. Concern with truth is simply more important than concern with hierarchy. But hierarchy, or at least present discussion of hierarchy, is not without positive value. It is essential that we conceive of a process by which we can achieve our constitutional goals. To this extent, the emphasis on means is proper. But, by definition, means and process are useful only if they are developed to facilitate the achievement of certain specific goals.

Liberal emphasis on a process-based hierarchy has failed largely because it has ignored debate over values. Critical attempts at defining new forms of government immanent in liberal democracy must avoid this pitfall. Our efforts to create efficacious mechanisms for human flourishing must never lose sight of the substantive goals which such mechanisms are meant to facilitate.

The goals of this essay, thus, are two-fold: First, to demonstrate the inherently stultifying nature of the present focus on

decisionmaking hierarchy by examining existing liberal theory and practice in the debate over judicial review; second, to explore the possibility of developing a critical theory to overthrow current (liberal) practice. This Article sketches a practical and theoretical framework which will allow us to attempt such a critique despite enormous practical and theoretical difficulties, not the least of which is the tenuous "immanent critique" available under modern capitalism.

Toward this end, a seemingly eclectic methodology is employed. This undertaking has been inspired by the critical spirit of the Frankfurt School,[3] the potential opening to greater political interpretive worlds of modern hermeneutics,[4] and finally the often underestimated political import of deconstructionism.[5] No claim is made to a thoroughly accurate representation of these theories. Rather, the goals of this work are to offer an effective critique of liberal ideas of the validity of judicial review and to put forward a personal proposal for a critical methodology and practice which will enable discussion of values other than those directly associated with structural hierarchy.

Such a proposal is made necessary by the failure of the left, and particularly of critical legal studies,[6] to offer a coherent theory with which to combat the entrenched power of liberalism. This failure is marked by a perpetual inability to go beyond criti-

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3. For works representative of Frankfurt School Critical Theory, see, *inter alia*, T. ADORNO, E. FRENKEL-BRUNSWICK, D. LEVISON & R. SANFORD, in collaboration with B. ARON, M. LEVISON & W. MORROW, THE AUTHORITARIAN PERSONALITY (1950); J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979); J. HABERMAS, THEORY AND PRACTICE (1973); M. HORKHEIMER & T. ADORNO, DIALECTIC OF ENLIGHTMENT (1972); H. MARCUSE, EROS AND CIVILIZATION (1966); H. MARCUSE, ONE DIMENSIONAL MAN (1964).

4. *See, e.g.*, H. GADAMER, TRUTH AND METHOD (1975). The conflict between hermeneutics and critical theory, particularly Habermas's view of communication, is well documented. The view adopted here is that proposed by Paul Ricoeur: that the common ground between the two schools is greater than the area of disagreement. *See* P. RICOEUR, *Hermeneutics and the Critique of Ideology*, in HERMENEUTICS AND THE HUMAN SCIENCES 63-100 (1981).

5. *See, e.g.*, J. DERRIDA, OF GRAMMATOLOGY (1976).

6. The Conference on Critical Legal Studies is an agglomeration of Marxist and non-Marxist scholars, lawyers and others, joined by a desire to provide a radical critique of law. It now appears to have solidified its position in academia to such an extent that it must cope with the pitfalls of "trendiness." For a good introduction to the eclectic nature of the Critical Legal Studies movement, see THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984) [hereinafter cited as *CLS Symposium*].

cism to a "practical" alternative. It is hoped that the proposal set forth here will in some way aid in the escape from the alleged utopian nature of critical theory to the practical application of progressive ideals.

Part I briefly examines the work of two apparently opposed scholars, Alexander Bickel and Charles Black. Their work, when viewed in light of certain Supreme Court decisions, points not only to the fundamental fallacy of liberal doctrine as we know it, but to the proper redefinition of the task of legal theory. In an overtly dialectic turn, this Article then demonstrates that the emphasis placed on the notion of "dialogue," particularly in Bickel's work, contains the key to the development of a critical hermeneutics. In other words, the lexicon of a progressive doctrine leading to a reconstructed order is inherent in existing theory.[7]

Subsequent sections of the Article examine the liberal concern with the structure of constitutional power to demonstrate, once again, a false vision. The debate surrounding the interpretive vision of Ronald Dworkin is highlighted. Dworkin has placed a great deal of emphasis on a doctrine of inherent meaning and constraint to justify and limit judicial review. In developing his view, he has emphasized current developments in literary theory. The fallacy of this doctrine of inherent constraint will be contrasted with another vision of literary theory, one based on a doctrine of community-based, historically contingent meaning.

Finally, the idea of community upon which the critique of liberal interpretivism is based is used as a key to understanding the strength and weakness of critical legal scholarship. A call is made for the revival of the idea of a redeemed community in which real

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7. While hermeneutics, particularly in its liberating manifestation, is potentially present in liberal theory, it maintains its subversive independence and non-hierarchical structure. As Richard Rorty says, "[h]ermeneutics sees the relations between various discourses as those of strands in a possible conversation, a conversation which presupposes no disciplinary matrix which unites the speakers, but where the hope of agreement is never lost so long as the conversation lasts." R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 318 (1979). "Immanent critique" is a form of theory and practice which recognizes the utopian vision of certain values of liberalism. The emancipatory vision of immanent critique seeks to extend the utopian elements found in liberal theory to their logical conclusions. Thus, immanent critique combines an emancipatory vision of humanity with a criticism whose weapons are borrowed from the theory being criticized. In many of its manifestations, it is internal rather than external. *See* Casanova, *Book Review*, 15 TELOS 187, 189-90 (1984) (reviewing J. COHEN, CLASS AND CIVIL SOCIETY: THE LIMITS OF MARXIAN CRITICAL THEORY (1982)).

open debate about truth and value will be possible. Refusal or reluctance by critical scholars to focus on the task of realizing a secular redemption of the political community has resulted in a fundamental weakness of progressive theory. The final sections of the Article hopefully will serve, at least, to re-focus our energies to this constructive end.

I. DECONSTRUCTING THE HIERARCHY

A. *After Passive Virtue: Alexander Bickel's Vision*

On May 31, 1983, the Supreme Court denied petitions for writs of certiorari in *McCray v. New York, Miller v. Illinois* and *Perry v. Louisiana*.[8] These cases questioned the constitutional validity of the use of the peremptory challenge by prosecutors to "exclude members of a particular group" (i.e., blacks) from criminal juries. The Court refused, in effect, to reconsider its 1965 decision in *Swain v. Alabama*.[9] Justices Marshall and Brennan insisted that the time for such a reconsideration was ripe, but Justices Stevens, Blackmun and Powell, after noting that two state courts had struck down on state constitutional grounds such use of the peremptory challenge,[10] concluded that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date."[11] The prevailing justices seemed to assume that the role of the state courts is to serve as laboratories for the Supreme Court. They did not seek to abdicate the Court's responsibility. Rather, they disclaimed sufficient knowledge upon which to form a valid decision. Informed judgment, they claimed, required further information which could be obtained only in the state courts.

The majority owes its principal intellectual debt to Alexander Bickel and his "passive virtues."[12] In his influential article, Bickel called for greater circumspection by the Court in constitutional adjudication. In particular, he invited the Court to use the denial

8. 103 S. Ct. 2438 (1983).
9. 380 U.S. 202 (1965).
10. *See* Commonwealth of Pa. v. Green, 316 Pa. Super. 608, 467 A.2d 1346 (1983).
11. 103 S. Ct. at 2438 (1983).
12. *See* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). *Contra* Gunther, *The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

of certiorari as a weapon to preserve the sanctity of the adjudicatory process. His goal, one based on structural institutional concerns, was to insure that the Court would deal only with truly important issues.[13] But not deciding is deciding. The debate into which Bickel entered, although couched in the language of structure, is one of values: which cases, which "rights," are worthy of the Court's attention and of possible inclusion in the constitutional fabric?

Such a statement, at one level, would come as little surprise to Bickel. For him, the function of the Court—that is, the role of constitutional adjudication—was to initiate dialogue—"conversations between the Court and the people and their representatives."[14] This interpretative (hermeneutic) process was for Bickel a dialogue of principle. Yet his Burkean[15] perspective could not allow him to admit that the conversation in which the Court served as initiator should be one of competing principles, each supported by rationality and objectivity, and each grounded in the aspirational goals of the Constitution.[16] Rather, Bickel described the dialogue as involving "principles of different orders of magnitude and complexity in the[ir] application."[17] Bickel would argue that there simply are some issues better left for *final* decision to the people, or to their representatives in the legislatures; the grubby, complex realities of political life are beyond the grasp of the courts and ill-suited to judicial definition. Higher, aspirational goals ("the ideal of progress") are within the realm of the Court. The Court, according to Bickel, must carefully choose its cases, deciding only those which permit it to declare the teleological principles of the Constitution. The practical consequences must be left to the "people."

Thus, Bickel quickly shifts from truth to hierarchy. This shift reveals the fallacy of his theory. By changing the level at which

13. That many minor cases may impose major individual hardships does not escape Bickel's attention. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 50-54 (1970).

14. *Id.* at 91. For another, more recent example of liberalism's limited and limiting use of the concept of "conversation," see B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

15. For an overview of the anti-progressivistic philosophy of Edmund Burke, see C. CONE, BURKE AND THE NATURE OF POLITICS (1957).

16. Illustrative of this point is A. BICKEL, THE MORALITY OF CONSENT (1975).

17. A. BICKEL, *supra* note 13, at 177.

the dialogue, or hermeneutic process, operates, he effectively neuters its liberating potential. Instead of allowing concern to lie principally with the concrete values involved in each case, and thus permitting an open and full discussion of these values, he falls back to argue about the institutional legitimacy of the process of judicial review. The discussion of ends is placed to one side and quickly forgotten while energy is expended on an isolated and largely unimportant concern with means.

This Bickelian concept of dialogue, with its necessary component of majoritarian approval through a graduated progress, has, like all great ideas, spawned progeny. Most interesting of these is Professor Charles Black's proposal that the Constitution may provide, in certain cases, a *right* to current majoritarian review.[18] According to Professor Black, while a citizen may not have a right to a particular *substantive* result, he[19] does have the *right* to process—in this case, current majoritarian process.

Such a theory, an almost inevitable result of Bickel's idea of the majoritarian/countermajoritarian dialogue, does offer a useful insight by proposing a theoretical explanation for at least two series of Supreme Court cases which have aroused a great deal of commentary and controversy. The first involves the constitutionality of the death penalty. The second (which, for the sake of brevity, will be referred to as "the Communist cases") involves the extent to which the Constitution protects the members of radical political groups. Evident in the cases of both these categories, as

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18. This idea is set forth in two footnotes by Guido Calabresi. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 201 n.43, 266 n.99 (1982). An intriguing example of this theory in action can be found in the Canadian Charter of Rights and Freedoms. Parliament may, by invoking a "notwithstanding" clause, override certain constitutionally guaranteed "fundamental freedoms" and "legal rights." CAN. CHARTER RTS. & FREEDOMS § 33(1). For an enumeration of these fundamental guarantees, see *id.* §§ 2, 7-15. Such a legislative override can be effective for a maximum of five years: "A declaration . . . shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration." *Id.* § 33(3). The overriding declaration may be re-enacted every five years, and the number of re-enactments permitted is limitless. *See id.* § 33(4), (5). Thus, Canadians are entitled to reasonably contemporaneous majoritarian review of legislation which abridges constitutional guarantees, but they are not entitled to a substantive outcome. It remains to be seen whether the use of the section 33 override will be reactive or pre-emptive—that is, whether Parliament will use this power to overrule particular court decisions or to preclude judicial review.

19. The use of the masculine pronoun is intentional. Traditional liberal concern with majoritarianism has suffered not only from the problems of properly defining "majority," but also from the difficulty of grappling with different "process" for men and women.

well as in both the majority and dissenting opinions in the peremptory-challenge case (*McCray*), is a concept which is central to an understanding of the Bickel-Black theories of constitutional adjudication: that of the fringes of constitutionality, the constitutional border line.

All legal decisions (constitutional or otherwise) involve value disputes. At the constitutional level, reasonable persons may differ as to which "interpretation," which finding of a fundamental value is "correct." Each side attempts to convince the Court that its interpretation embodies the truth.[20] But not every issue decided by the Court provokes equal controversy. Some values, when confirmed by the Court, obtain, as a practical matter, widespread support in the "community."[21] Others are not as readily accepted. Debate continues, often inflamed by the Court's decision. The Court is often brutally criticized by supporters of the losing cause.

There are other decisions which are grayer than either extreme. Both the death penalty and Communist cases fit into this twilight area of the constitutional landscape, the area on the fringes of constitutionality.

Opinions on the constitutional permissibility of the death penalty differ radically; some believe that it is always unconstitutional, others that it is perfectly constitutional, still others that it is constitutional or unconstitutional as applied. Indeed, the fundamental values of the liberal democratic society are starkly confronted when the issue becomes that of the state-sanctioned taking of human life. One explanation of the Court's decision in *Furman v. Georgia*[22] is that at least some of the members of the Court felt that the death penalty was an issue which had come into conflict with the evolving values of our society. By framing the decision as it did, the Court expressed the ideal/aspiration that society had developed to such a state that the death penalty would become a relic of the past. Legislative reaction to *Furman* quickly disabused

20. Since, in the view of the Court and of traditional liberal scholars, truth is "objective," losers in the adversarial process are stigmatized, implicitly or otherwise, as "liars"—that is, as persons who have adopted positions embodying "untruth."

21. The difficulty inherent in such a bold statement about the existence of community is recognized, and its use is attacked below. *See infra* notes 58-59 and accompanying text. It is used here as a part of common discourse without ontological or epistemological support.

22. 408 U.S. 238 (1972).

the Court of any such notion. By 1976, when *Gregg v. Georgia*[23] was decided, at least thirty-five states had reacted to *Furman* by reintroducing death penalty legislation. The dialogue initiated by the Court in *Furman* had been brought to a "conclusive" end by current majoritarian (i.e., legislative) rejection of the Court's vision.

The Communist cases[24] are in a similar vein. Viewed as an abstract political-legal question, the outlawing of a particular political party poses serious questions of first amendment freedoms. Ill-defined as they are, the liberties guaranteed by the first amendment have held, and continued to hold, a particular place in the dominant mythology. But the Smith Act[25] (and the entire family of provisions which preceeded and followed it) was not seen as such an abstract question. In *Dennis v. United States*,[26] the Court came face to face with the ugly hysteria of McCarthyism and "The Red Menace." In that case, the leaders of the Communist Party of the United States were charged under the Smith Act with conspiring to advocate the violent overthrow of the government. The Court was faced with a piece of legislation passed overwhelmingly by Congress in response to a clearly (if mistakenly) perceived threat to the very existence of the nation. The *Dennis* opinion was written by Justice Frankfurter, and it reflects most clearly the practical manifestation of the Bickelian[27] world view.

> It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction of freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate

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23. 428 U.S. 153 (1976). "Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts." *Id.* at 174.

24. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Greene v. McElroy, 360 U.S. 474 (1959); Kent v. Dulles, 357 U.S. 116 (1958); Watkins v. United States, 354 U.S. 176 (1957); Dennis v. United States, 341 U.S. 494 (1951); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1950).

25. Smith Act, ch. 439, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. §§ 2385, 2387 (1982)).

26. 341 U.S. 494 (1950).

27. It is no accident that in *The Supreme Court and the Ideal of Progress*, Bickel portrayed (though not uncritically) Justice Frankfurter as the paradigm of judicial reasoning. *See* A. BICKEL, *supra* note 13, at 29.

the same ends.[28]

The protection of the nation in the Frankfurtarian-Bickelian universe is left to Congress. It is a principle about which dialogue is unnecessary. Fact replaces conversation.

The Smith Act and its relatives remained nonetheless on the fringes of constitutionality.[29] One cannot help but sense, particularly in *Greene v. McElroy*[30] and *Kent v. Dulles*,[31] the regret felt by the Court over its complicity in outlawing a political party. While it did not have the desire or the courage to overturn *Dennis* explicitly, in subsequent cases, the Court struck down related administrative decisions and congressional contempt powers. The Court invoked constitutional concepts of a structural nature which are central to the Bickelian tradition. We sense in *Kent* the accuracy of Professor Black's notion of a right to *current* majoritarian review without a substantively guaranteed result. The refusal of the Secretary of State to issue a passport was not per se unconstitutional. Rather, the authority to do so had to be accorded specifically by Congress. The plaintiff had no right to a passport, but he did have a right to have it refused (or issued) on standards directly proposed by the elected majoritarian branch of government. In *Greene*, the Court struck down the revocation of a security clearance because the regulation under which it had taken place had not been *explicitly* authorized by either the President or the Congress.[32] Pending reconsideration of the entire Frankfurtarian legacy and a reversal of *Dennis*, the Court could not seek to invalidate such actions on strict first amendment grounds. While the plaintiff in each case had no substantive right to exercise his first amendment interest, he did have, according to one view of the Court's position, a right to *current* majoritarian (i.e., legislative or executive) review.

Cases like *Kent* and *Greene* suggest that the Court desired a continuation of the constitutional conversation. Regretting its "good bye" in *Dennis*, the Court sought to reinstate its position as partner in a continuing colloquy. It knew that it had too hastily defined the order and magnitude of the principles and functions

28. *Dennis*, 341 U.S. at 550-51.
29. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 97-160 (1970).
30. 360 U.S. 474 (1959).
31. 357 U.S. 116 (1958).
32. 360 U.S. at 508.

in question.[33] Perhaps Professor Emerson was correct when he stated that the Court, "having traversed its winding route and [having] had the opportunity to elucidate itself and the nation, . . . now [has] reached the place where it is ready to face the issues fully and without unnecessary caution."[34]

In both the death penalty and Communist cases the debate remains centered where it continues to perplex commentators who seek to justify judicial review. The emphasis of both Bickel's and Black's commentary continues to be "functional": they see the ephemeral boundary between democratic tyranny (majoritarianism) and anti-democratic tyranny (countermajoritarianism). For a Burkean such as Bickel, this position is not surprising. Nor is Professor Black's theory shocking; by his own admission, he is greatly concerned with structure and function in constitutional law.[35]

But Professor Black is not concerned solely with these issues, and his theory of current majoritarian review as a procedural right must not be assessed without noting his positions on related issues. His record in defense of the rights of blacks and his stance on the death penalty[36] speak for themselves. In at least one instance, he argued that the most "majoritarian" of all methods, the popular referendum, should not be used to deprive blacks of their substantive right of access to the political process.[37]

Black's views can best be understood in the context provided by *Reitman v. Mulkey*.[38] In that case, the California legislature had passed several statutes effectively banning racial discrimination in housing. By initiative and referendum, the voters approved Proposition 14, which amended the state constitution to provide:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or

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33. This does not mean the victory was assured for those attacking government action. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

34. T. EMERSON, *supra* note 29, at 160.

35. *E.g.*, C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

36. *See* C. BLACK, CAPITAL PUNISHMENT—THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).

37. Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

Certain scholars, such as Guido Calabresi, argue that referenda can be used to cheapen constitutional values. *See* G. CALABRESI, *supra* note 18, at 12, 69.

38. 387 U.S. 369 (1967).

> desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons he, in his absolute discretion, chooses.[39]

The Court successfully overcame certain obstacles[40] to the judicial invalidation of such a negatively worded amendment. But the Court's motivation for striking down the provision surely had less to do with fundamental grammar than with a mistrust of naked majoritarianism. Justice Douglas, concurring, offered this characterization: "Proposition 14 is a form of sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions allow their government to do."[41]

The reason for objecting to such raw majoritarianism as reflected by referenda is put succinctly by Professor Black: "What is carved out, . . . constitutionalized, and so put beyond ordinary political attack, is a small area, absolutely vital so far as racial discrimination is concerned but of rather uncertain importance otherwise."[42]

According to Black, then, current majoritarian review is either a preliminary or an ex post facto protection. It may be invoked in one of two ways. If an administrative or executive decision has not achieved current legislative approval, it violates basic structural or hierarchical principles and can be struck down.[43] If, on the other hand, a practice or statute approaches the fringes of unconstitutionality, a court may simply strike it down because the plaintiff has not been granted the necessary procedural guarantee of current consideration by a majoritarian body.[44] Even current review, which would satisfy this procedural requirement, does not preclude substantive reversal. If the right is important enough (under an as yet undetermined standard), a court may or must act to grant substantive protection.[45] Thus, while the California amendment had been subjected to the most direct, most majoritarian of reviews—the popular referendum—the Court was

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39. CAL. CONST. art. I, § 26 (1964, repealed 1974). *See Reitman*, 387 U.S. at 371.

40. The primary obstacle was the difficulty of characterizing such wording as "state action." *Reitman*, 387 U.S. at 374-76.

41. *Reitman*, 387 U.S. at 383 (footnotes omitted).

42. Black, *supra* note 37, at 80.

43. *See Greene*, 360 U.S. at 474.

44. *See Furman*, 408 U.S. at 238.

45. *See Reitman*, 387 U.S. at 369.

not precluded from stepping in to enforce the higher values inherent in the Constitution.

Yet even Professor Black's view of substantive rights is inextricably bound up with structure. For him, as for Ely,[46] some acts of current review cannot stand because they are "structurally" unsound. They foreclose participation in the political process. Blacks are excluded from a proper place in the socio-political (and constitutional) dialogue because the "ordinary political processes"[47] are closed to them. Majoritarian review, current or otherwise, direct or mediated, cannot be allowed to pervert the political process. This theory of judicial review seeks to open up the conversation of American society, but appears unwilling to offer an opinion as to the substance of the discussion.

Democracy, or a particular view of American democracy, demands deference and dialogue not to and with "the people" but rather with the legislative branch of government. Majoritarianism, naked and uncivilized, must be tamed and mediated through the electoral process. The debate over judicial review in constitutional law does not involve the people but two (perhaps three) branches of government, each of which speaks for and to the people. Such "colloquy" or "conversation" between the government and the people is at once the strength and weakness of Bickelian language. It offers a vision of the free exchange of ideas, discussions between civilized beings concerning matters of fundamental importance, a national dialogue in search of truth. Such language is misleading.

The debate remains dangerously limited. The underlying values which Bickel attempts to preserve are those of process. His concern is with structure. The colloquy which takes place in this limited world is one between courts and legislatures. The normative context must take second place because the important question, the one which must be solved if we are to remain a viable and justifiable democracy, is the validity of the process of judicial review.

If we are to maintain our "democratic" traditions, we must require all branches of government, majoritarian and otherwise, as we must require all citizens, to discuss and define the content of

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46. *See generally* J.H. ELY, *supra* note 1.
47. *See Reitman*, 387 U.S. at 369.

our normative universe. Authority must come not from considerations of hierarchy but from considerations of value.[48]

B. *The False Hermeneutics of Majoritarianism*

Concern with structure is not without importance.[49] Democratic government may require certain hierarchical arrangements. Indeed, the Constitution itself is concerned primarily with such arrangements. The values—whatever they may turn out to be—embodied in the Bill of Rights, are, to a certain extent, an historical afterthought.[50]

While structure is important, a preoccupation with it is neither a sufficient nor a necessary condition for democratic flourishing. Beneath the sometimes impermeable mythology of form, process, and structure hides substance.[51] We are defined as human beings by the substantive content which we give to our lives.[52] As citizens, we are defined, to a large extent, by the substantive content of our collective existence. The discussions of most constitutional scholars who have attempted to find justifications for judicial review have failed to grasp this fundamental point.[53] The decency and worth of the nation must be assessed by an examination of the "truth" of its values, not by a superficial examination of its method.[54]

Concern with proper deference to majoritarian branches of government manages to block and mask inquiry into the norma-

48. *See* Mansbridge, *Living with Conflict: Representation in the Theory of Adversary Democracy*, 91 ETHICS 466 (1981).

49. Structure is often vitally important, but only when it relates to and facilitates goals. *See* K. ARROW, THE LIMITS OF ORGANIZATION (1974); G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978); O. WILLIAMSON, MARKETS AND HIERARCHIES (1975). Nor is "structuralism" without its uses in the development of a valid hermeneutics. *See, e.g.*, P. RICOEUR, THE CONFLICT OF INTERPRETATIONS 30 (1974). For trenchant criticisms and analyses of the limits of structuralist thought, see F. JAMESON, THE PRISON-HOUSE OF LANGUAGE (1972); R. UNGER, KNOWLEDGE AND POLITICS 132 (1975).

50. *See generally* C. BLACK, *supra* note 35.

51. *See* J. DERRIDA, *Force and Signification*, in WRITING AND DIFFERENCE 3 (1978).

52. *See* J.P. SARTRE, BEING AND NOTHINGNESS (1943).

53. Arguments about substantive rights are not totally absent from these discussions. *See* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). *But cf.* Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980).

54. This distinction is essential to an understanding of the school of hermeneutic philosophy developed by Gadamer. *See* H. GADAMER, *supra* note 4; R. RORTY, *supra* note 7, at 357. Truth does not mean objective, ordained, or natural truth. Rather, it is historical and highly political. Truth is fundamentally a matter of belief.

tive content of our existence. It equates value with structure. The simple fact that a majority has declared some value or faith worthy of legal sanctification determines the goodness of that faith.[55] Such a position fundamentally undermines the hermeneutics through which we must search for the values of our society. Human existence and the values which it can, indeed must, embody are infinite.[56] We cannot hope to discover these values if we are to limit our definitive and authoritative dialogue to two (or three) branches of government, one of which, hierarchically, has ultimate authority.[57]

The closed nature of the inquiry which involves as its key component deference to the majoritarian branches is obvious. Not only does it involve an incredibly narrow version of the human condition, but it crucially misinterprets the present nature of American government. That simple majoritarian government was ever meant to be the essential part of American democracy is, of course, doubtful. The delicate system of checks and balances which is essential to the structure of the constitutional arrangement belies any attempt to declare majoritarianism as *the* governing principle. Even on their own terms, traditional theories of judicial review must fail.

Whether there has ever been, or can ever be, a "majority" is an equally important question. Professor Dahl, for instance, ar-

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55. Brevity requires such a generalization. At one level, it is possible to argue that truth can be found only within a structure. According to such a theory, truth is associated with winning and winning is determined and defined only within the system of our government and community. *See* S. FISH, IS THERE A TEXT IN THIS CLASS? 338 (1980). The argument here is at a different level. Truth is political and is therefore reflected in power. This does not mean that the mere dictates of a particular body are imbued with *objective* validity, nor that they must be blindly accepted. Debate is never foreclosed as long as there are believers.

56. We owe much of this insight to Heidegger, *see* M. HEIDEGGER, BEING AND TIME (1962), and to Gadamer's elucidation and broadening of a theory of the hermeneutical experience. *See* H. GADAMER, *supra* note 4, at 153-447. The key concept here is that of the hermeneutic circle:

> The main point of the hermeneutics of facticity and its contrast with the transcendental constitution research of Husserl's phenomenology was that no freely chosen relation toward one's own being can go back beyond the facticity of this being. Everything that makes possible and limits the project of There-being precedes it, absolutely.

Id. at 234.

57. Some of the problems of such a hermeneutics of jurisdiction are uniquely dealt with by Professor Cover. *See* Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

gues rather persuasively that America has been governed by an ever fluid coalition of minorities.[58] Indeed, the existence of such doubts about the majoritarian nature of the elected branches of government is what gives particular weight to such process-based theories of judicial review as that of Ely.[59] The exclusion, both voluntary and involuntary, of large segments of the American population from official participation in the electoral process makes dubious the existence of even a de facto majoritarianism.

A more important difficulty, of concern both in practice and in principle, is the very determination of majority status. Illustrative of this difficulty is the conflict with which the Court was confronted in the *Bob Jones University*[60] case. The case can be fairly described as a test of Ronald Reagan's commitment to the "moral majority,"[61] which was given much of the credit for Reagan's victory.[62] In return for the group's support, Reagan vowed to foster a reaffirmation of Christian principles in American politics and institutions. One of his first opportunities to do so arose from the controversy surrounding the IRS's decision to terminate the tax-exempt charitable organization status of Bob Jones University, a religious school with strict prohibitions (based on Biblical interpretation) of inter-racial dating and miscegenation. The legal issue in the case was the validity of the IRS's action under the relevant statute. But in the eyes of the public, the case presented a confrontation between those who viewed the exemption as state-subsidized racial segregation and those who felt that the denial of the exemption inhibited the free exercise of religion. Both sides of

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58. R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

59. *See generally* ELY, *supra* note 1. *See also* Cover, *Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

60. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).

61. This term is used to describe a group of people including not just those in the "congregation" of Reverend Falwell which carries the name, but rather all proponents of a particular world view characterized by conservative politics and a deeply felt, fundamentalist Christian faith.

62. Through the use of sophisticated, computer-based mail solicitation and organizing techniques, the group "targeted" several high-profile members of Congress for defeat and lent a great deal of financial, physical, and moral support to the Reagan campaign. The chief determinants of the group's support were a candidate's views on abortion and school prayer. The group's success was not limited to the Reagan victory. *See, e.g.*, Stempel & Morris, *Electoral Folklore: An Empirical Examination of the Abortion Issue*, 1 YALE L. & POL'Y REV. 1 (1982).

the confrontation, of course, reflected "majority" values. The situation thus presented a classic dilemma of majoritarianism: which "majority's" claim to majority status is to be believed? Should authority be given to a short-term, recent majority, able to use the rules of the mass media and electoral politics to gain an upper hand on a longer-term majority, one for whom there is "a firm national policy to prohibit racial segregation in public education"?[63] The appearance on behalf of the university of the Assistant Attorney General for Civil Rights suggests the hollowness of the Administration's claim to majoritarianism, particularly in the perception of the unregistered voters of the urban ghettoes and the rural south.

C. *The Sanctuary of Ronald Dworkin—For Priests Only*

Objections to process-based theories are themselves basically process-based. We must avoid this dialectical cul-de-sac by insisting upon a discussion of values. The emphasis placed by Ely and others on structural justifications of judicial review subverts the open-textured nature of human society.[64] What such appeals do is vest authority in a given interpreter or interpretive community[65] occupying a position of supposed hierarchical superiority. We shall be unable to escape from this structural enclosure to a discussion of *telos* unless we overthrow the tyranny of interpretive hierarchy. By seeking greater hermeneutic flexibility, hierarchy will be replaced by democracy. Only if we are able to establish a popular democratic community of interpretive interest will we be in a position of hermeneutic opening. At present, the law and the legal system in general cannot pretend to represent the democratic, open community which will show the broader public the way to such interpretive freedom.[66] Rather, law continues to per-

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63. *Bob Jones Univ.*, 103 S. Ct. at 2029.

64. *See, e.g.*, J.H. ELY, *supra* note 1.

65. *See generally* S. FISH, *supra* note 55.

66. In a recent article, Feher and Heller examine the dual goals of freedom and life in the context of social movements such as Critical Legal Studies. *See* Feher & Heller, *From Red to Green*, 15 TELOS 55 (1984). Our viability as a social movement depends upon our ability to reinforce these two primary values by an aggressive attack on normality. According to their thesis, social movements in the 1960's were primarily concerned with freedom ("sex and drugs and rock 'n' roll"), while those of the 1970's and 1980's have concentrated on life (avoiding nuclear disaster, saving whales). For Feher and Heller, the two goals are not mutually exclusive, but rather are mutually dependent. The criterion by which the left

petuate and reinforce hierarchy.

We must acknowledge that we, as lawyers and as citizens, have managed to establish constitutionalism as a new religious faith. Lawyers, both in the practice of private law and at the level of constitutional interpretation, have adopted many of the characteristics of a mystical priesthood.[67] Sources of law—the Congress and the Constitution—take on sacred qualities by the force of their existence. It is heresy to go beyond the text. There is no other law.

Our public personnae and some of our personal beliefs continue to be professedly deontological. We continue to maintain that there are findable values and knowable, objective truths. And we know exactly where to look for them. The sources of law (and therefore of value and truth) are limited: Congress and the Constitution.[68] We look for truth in sacred text and hierarchy.

The position adopted by Ronald Dworkin is instructive.[69] It is also reflective of the inherent fallacy of liberalism. Truth, for Dworkin, is found in process.[70] There is an ordering of values just as there is an ordering of authority. For him, hard cases do not really exist; there is just a difference between policy and principle. Policy is to be left to the rough and tumble of the political process; principle, to adjudication. Principle forces judges to yield to policy—that is, they must obey the clear policy statements of the legislators. Of course, principle also commands that they limit those policies to their most narrow acceptable areas of

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must judge each movement is whether it can "generate new norms of discursive rationality." *Id.* at 43. The approach to all social movements is therefore hermeneutic. Freedom and life are the values which movements seek to crystalize. They can succeed only by challenging existing normality. *Id.* The exact practical content of these values, however, remains highly problematic.

67. *See* F. RODELL, WOE UNTO YOU, LAWYERS! (1939).

68. For present purposes, the problem of sources of non-constitutional (common) law shall be ignored.

69. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978); Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179 (1979), *reprinted in* 60 TEX. L. REV. 527 (1982).

70. This is true of only one level of Dworkin's argument. He does adopt a position that there is a primary value—the equality principle—which must always be chosen. To a certain extent, then, he superimposes process constraints, particularly stare decisis, on his deontological model in order to confirm and maintain it. One reason judges cannot venture out on their own is that it would be a violation of the principle of equality to do so. For a recent criticism of this part of Dworkin's theory, see Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103, 1127 (1983).

application.[71]

Dworkin does not maintain that principle, or substance, runs wild. Limits are placed on principle (i.e., on judges) by structure. Not only must judges officially yield to concerns of hierarchy (i.e., to the will of the majoritarian legislature), they also are constrained by the very nature of their enterprise:[72] they are limited by the judges who came before them and by those who will follow. Like authors or literary critics, judges are "unfree," chained both by "history" and "future."

Of course, this "unfreedom" is in reality determined not by strict hierarchy but by social norms. The judges' conceptions are limited to the normal. They cannot venture out in *new* directions unless the directions are "acceptable." We would react to such "abnormal" jurisprudence by saying: "Judges can't do that."

> Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed.[73]

The problem, then, is not one of hierarchy per se but rather of interpretation as appropriation (normalization). A text or legal rule is appropriated into a language and a culture where normality is assumed. Arguments are made not between absurdities but between two pretenders to normality and hence to validity.[74] The winning position becomes an accepted, and therefore powerful, part of the culture. Blaming it all on the structural hierarchy of government is inaccurate and dangerous. The hierarchy itself determines values when it chooses between and among values, not when it finds the only value. Questioning an interpretation of a particular priesthood may also cause us to question the whole dogma of that priesthood. Those whose rules depend upon holy sanction can little afford demonstrable, human error.

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71. *See generally* R. DWORKIN, *supra* note 69.

72. *See generally* Dworkin, *supra* note 69.

73. Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 9 CRITICAL INQUIRY 201 (1982), *reprinted in* 60 TEX. L. REV. 551 (1982). For the latest salvo in the Dworkin-Fish debate, see Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983) [hereinafter cited as Fish, *Wrong Again*], and Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, in THE POLITICS OF INTERPRETATION 287 (W.J.T. Mitchell ed. 1983).

74. S. FISH, *supra* note 55, at 306.

We are expected, indeed required, to follow the articles of faith as declared by structure. Bickel, Black, and Dworkin, each in his own variant of the vision, would have us bow to structure. Institutionalized declarations are offered as truth, to be obeyed unthinkingly and without criticism. Hierarchy, for the liberal, takes on totemic power. Liberalism offers us the false god of structure.

II. On Discovering the Sources of Truth

These are familiar criticisms, so familiar that they seem aphoristic. Yet, despite these and similar criticisms, liberalism has survived as the preeminent doctrine in American legal scholarship. The particular strength of liberalism as it is manifested in the American political system is its ability to bridge the gap between theory and practice, between vision and reality. More accurately, it has managed to achieve acceptance as the dominant myth of American life. As Professor Cover notes: "If law reflects a tension between what is and what might be, law can be maintained only as long as the two are close enough to reveal a line of human endeavour that brings them into temporary or partial reconciliation."[75]

The ability of the American legal system to deal with fundamental conflicts in a "legalistic" way also is remarkable. Resort to overt violence and domination have not been necessary (since the Civil War, at least) to maintain and sustain American society.

There are, of course, more subtle forms of violence. As Cover and Burt[76] point out, exclusion is violence. Legally buttressed attacks on "discrete and insular minorities" smack of brutality. The exclusion of those who believe that abortion is murder from the mainstream of the American legal system cannot help but inflict heavy "process costs"[77] upon them. Their values find no currency in the American realm; they cannot participate in the hermeneutic conversation, in the construction of the system of constitutional values.

For many years, legal scholars have attempted to develop a theoretical construct which will ensure "liberty and justice for all"

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75. *See* Cover, *supra* note 57, at 39.

76. *See* Cover, *supra* note 57; Burt, *Constitutional Law and the Teaching of the Parables*, 93 Yale L.J. 455 (1984).

77. G. Calabresi & P. Bobbitt, Tragic Choices 53-79 (1978).

within totalizing hermeneutics. These attempts are well known and have achieved varying degrees of acceptance. They have also received greater and lesser degrees of strident attack, first from the exquisite technical armory of the legal realists and then from the self-proclaimed inheritors of the realist tradition, the critical legal scholars.[78] I shall leave criticism of the merits of liberalism to others.[79] Criticism from the left is my primary focus.

The left, as I have already mentioned, has yet to come to grips with the power of liberalism. While critical attacks on the existing basis of Western society have an apparent internal consistency and offer valid insights into the weakness of liberal theory, they have yet to offer a valid alternative.[80] This failure exists at two levels. The left has not managed to develop a coherent process which would permit both accurate criticism and concrete implementation of counter-proposals. Because the process has not been outlined, the second failure of the left is obvious: it offers no practical alternative to our lives as they now are. Any concrete proposal about values must fail because it will inevitably be labelled as impractical and utopian. The remainder of this Article attempts to remedy this problem.

Leftist criticism of liberalism is not limited to the realm of legal scholarship. Both literary criticism and philosophy have "critical" movements.[81] Can we, as lawyers, learn from these disci-

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78. Roberto Unger and Mark Tushnet shall be assumed to be representative of the area under study. *See generally* R. UNGER, KNOWLEDGE AND POLITICS (1975); Tushnet, *supra* note 1; Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979) [hereinafter cited as Tushnet, *Truth, Justice, and the American Way*]; Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

79. *See* Shiffrin, *supra* note 70.

80. As one participant in *Stanford Law Review*'s recent symposium on critical legal studies put it: "Critical legal writing systematically evades the question, 'Compared to what?' " Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 260 (1984).

81. *See supra* note 3. *See generally* H. BLOOM, A MAP OF MISREADING (1975); J. DERRIDA, *supra* note 48; S. FISH, *supra* note 61; F. JAMESON, MARXISM AND FORM (1974); J. KRISTEVA, DESIRE IN LANGUAGE (1980); H. MARCUSE, AN ESSAY ON LIBERATION (1969).

Recent developments, particularly those in literary theory, must not be accepted unthinkingly. Like all American social theory, left literary criticism suffers from the lack of a coherent (grand or otherwise) Marxist framework. Attempts such as Jameson's "diachronic" and "synchronic" hermeneutics fail to draw a convincing line between Marxism and wishful thinking. For the limits of this approach, see P. RICOEUR, *supra* note 49. Moreover, there is a disillusioning realization that literary critics function within and be-

plines? The hermeneutic philosophy of Hans-Georg Gadamer[82] and the literary deconstructionism of Jacques Derrida[83] may be particularly useful. Moreover, reflections on recent areas of interest in literary theory—canonization and the role of original intent—may demonstrate the value of such interdisciplinary study as a propaedeutic for effective legal criticism.

A. *Unmasking the Holy Text—Deconstructing the Constitution*

The process of the canonization of texts, to a certain extent, presents less epistemological difficulty for legalists than for students of literature. The primary canon, the sacred text of legal scholarship, is the Constitution; it is readily available. Like the Talmud or the Bible, it remains *the* authoritative text. But recognition of canonical quality is only the first step. There may, for example, be other canonical texts which must be invoked in order to grasp the full ontological fabric.[84] Meaning may be obfuscated either in the primary text or by the very existence of a multitude of secondary texts. For lawyers, the recognition of the "secondary" interpretive texts may present problems which are particularly acute: Which of the great scholars and judges are to be given what degree of authority? What of equal, apparently contradictory, authority? Who shall constitute the primary, authoritative interpretive community?

Many of us, while willing to accept the analogy to religious scholarship, refuse to take the final step. We question the divine authority of the primary canon. We must have a living constitution, a text with mythical characteristics able to deal with practical

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come part of, the system which they strive to reject. *See* E. SAID, THE WORLD, THE TEXT AND THE CRITIC 166-77 (1983).

82. *See generally* H. GADAMER, REASON IN THE AGE OF SCIENCE (1982) [hereinafter cited as H. GADAMER, REASON]; H. GADAMER, *supra* note 4; H. GADAMER, PHILOSOPHICAL HERMENEUTICS (1972) [hereinafter cited as H. GADAMER, HERMENEUTICS].

83. *See generally* J. DERRIDA, *supra* note 51; J. DERRIDA, *supra* note 5.

84. Concern with sources continues to be a popular area of discussion in diverse legal communities. *See* Perelman, *Juridical Ontology and Sources of Law*, 10 N. KY. L. REV. 387 (1983); *"Sources" du droit*, 27 ARCHIVES DE PHILOSOPHIE DU DROIT 1 (1982). Of particular interest is the as yet unresolved debate over language as a source of legal and societal power. See A. GIULIANI, *Nouvelle Rhêtorique et Logique du Langage Normatif*, in 4 ETUDES DE LOGIQUE JURIDIQUE 65 (1970); Goodrich, *Rhetoric as Jurisprudence: An Introduction to the Politics of Language*, 4 OXFORD J. LEGAL STUD. 88 (1984). Similiar concerns have been voiced about "text" as power. *See* F. NIETZSCHE, ON THE GENEALOGY OF MORALS (1887); E. SAID, *supra* note 81, at 45-46.

human conflict and frailty; thus arises the debate over "intent of the framers." Our real doubts regard the "secondary" sources. The decisions of the great judges—Holmes, Brandeis, Marshall—carry with them certain canonical qualities, yet we do not wish to carve their wisdom in stone. Stare decisis remains a useful, but flexible doctrine.[85] These men,[86] after all, suffered from the frailties of the human condition. They, too, were products of their age, class, and education.

At this level of doubt, recent literary scholarship becomes important. We must recognize what we have been doing, at least subconsciously, during the process of canonization. We have *received* wisdom. We, by the very act of reception, have canonized the text and shaped the content of the canon.[87] The very act of accepting to be bound gives value to the text (decision) which we follow, not because of its intrinsic, ahistorical normative value-content, but because we, for a multitude of reasons (including our acceptance of the simple hierarchical values of certainty and continuity) recognize and declare, more or less openly, that value.

We cannot recognize the unfamiliar. Our recognition of value is the normalization to the canon.[88] We appropriate the past to a level of present and future hierarchical value. We recapture (and betray)[89] that past. We defeat history by denying its historical nature, and make the past, for the present, timeless. The survival "of a text—and . . . its achievement of high canonical status . . . —is the product . . . of a series of continuous interactions among a variably constituted object, emergent conditions, and mecha-

85. For Dworkin, it remains an essential doctrine. *See supra* note 65.

86. Feminism has taught us that the fact that they are men, at the very least, is an important factor.

87. Much of the work in hermeneutic philosophy and literary criticism emphasizes the importance of the reader as changer of the text. *See, e.g.*, J. DERRIDA, *supra* note 51.

88. Hegelian-Lukacsian philosophy would label this process, especially in law, "reification." *See* Gabel, *Reification in Legal Reasoning*, 3 RESEARCH L. & SOC. 25 (1980).

89. "To live, the poet must *misinterpret* the father, by the crucial act of misprision, which is the rewriting of the father." H. BLOOM, *supra* note 81, at 19. This is the problem of all "constitution" and translation. The project of interpretation and of normalization involves the translation of language and value from one level of discourse to a higher, canonized level. Like all translation, it must necessarily involve betrayal. *See* Calabresi, *Thoughts on the Future of Economics in Legal Education*, 33 J. LEGAL EDUC. 359 (1983). "To translate . . . is to betray. That is the translation, and the betrayal, of an Italian saying: *Traduttore, traditore.*" *Id.* at 364. Walter Benjamin, on the other hand, argued that "translatability" is an inherent and essential feature of certain works. *See* W. BENJAMIN, ILLUMINATIONS (1968).

nisms of cultural selection and transmission."[90]

Regarding judicial review, we give value to a text because, and only because, it has a place in a hierarchical arrangement. We grant unto a text canonical stature because it is, in effect, a canon. We declare the stature not because of the *value* of the declaration, but rather out of simple historical contingency (chosen among *all* other historical contingencies)—that is, the voice whence comes the declaration. In other words, we falsify history by placing structure outside the course of time. When we adopt a liberal view of the value of majoritarianism or speak in terms of Bickelian colloquy, we attempt to falsify the historical evolution of human thoughts and normativity.[91] We immortalize structure.

Similar structural problems arise out of legal scholars' attempt to ground "meaning" of the Constitution within or without the intent of the Framers. The liberal wish to recognize a living, evolving constitution has lead them to attack those[92] who call for limiting judicial review to a search for original intent. Scholars such as Perry[93] and Bobbitt[94] seek a justification for a more open judicial review in the "American ethos." Courts engage in a search for "a firm national policy"[95] so that they can validate their function therein. The practical difficulties encountered by those who call for the search for such an *ethos* are tremendous. The theoretical difficulties of such a position are overwhelming.

The search for a religious analogy is not misplaced.[96] All religious interpretation is predicated upon an apprehension of God's

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90. Smith, *Contingencies of Value*, 10 CRITICAL INQUIRY 1, 26 (1983). Religion cannot, despite its inherent claim to complete transcendence, escape the political nature of the canonization process. *See* Burns, *Canon and Power in the Hebrew Scriptures*, 10 CRITICAL INQUIRY 462 (1984).

91. *See* Harman, *Human Flourishing, Ethics and Liberty*, 12 PHIL. & PUB. AFF. 307 (1983). Gilbert Harman argues persuasively that these evolving historical norms constitute our moral universe. "I suggest that the source of morality lies not in the nature of things but in human arrangements. People come to accept certain rules and values in order to get along with each other." *Id.* at 321.

92. *E.g.*, R. BERGER, *supra* note 1.

93. *See generally* P. BOBBITT, *supra* note 1. For a critique of Bobbitt's work along the lines developed below, see Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 765 (1982).

94. *See generally* M. PERRY, *supra* note 1.

95. Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2029 (1983). *See supra* text accompanying note 63.

96. Gadamer analysed subjectivism and the search for original intent in terms of "divine grace." *See* H. GADAMER, *The Nature of Things and the Language of Things*, in HERMENEUTICS, *supra* note 82, at 69-81.

will/intent as the primary hermeneutic framework. The obvious difficulties (aside from achieving divine revelation) of finding an authoritative interpretive community are insurmountable. The Bible, according to some, condemns homosexuality and even blood transfusions. Others, relying on the same source, disagree. The matter necessarily becomes not so much one of objective, rational authority (i.e., of truth) but rather is "reduced" to belief—textually grounded, but belief nonetheless. The truth of Biblical interpretation is not epistemologically verifiable.

Similar debates have long been waged in literary circles. Is authorial intent the key to meaning or is the search for meaning open to "interpretation"? Recent developments appear to place the debate at a more constructive level. We must now refocus our energies. The question is not whether authorial intent is the key to meaning, but why we engage in the exercise at all. Even if we are to accept that intent and meaning are found on opposite sides of the literary (and constitutionalist) equation, we are faced with the impossibility of discovery. There is no language (or meaning) before intent.[97]

Intent does indeed equal meaning. Since there is no theoretical construct which will enable us to discover the truth, we must resort to belief. The consequence of such a position leads, its proponents argue, to the abandonment of theory and the embracement of practice as the main preoccupation.[98]

> Not because theory and practice . . . really are separate but because theory is nothing else but the attempt to escape practice. Meaning is just another name for expressed intention, knowledge just another name for

97. For the most provocative exposition of this theory, see Knapp & Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 724 (1982). *See* O'Hara, Hirsch, Crewe, Mailloux, Parker, Rosmarin & Dowling, with reply by Knapp & Michaels, *For and Against Theory*, CRITICAL INQUIRY 725 (1983). *See also* H. GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 96. Fish also adopts this position, "[b]ut it is precisely my thesis . . . that in whatever way one establishes an interpretation, one will at the same time be assigning an intention." Fish, *Wrong Again*, *supra* note 73, at 314.

98. Compare Marxist theory and *praxis* with that of its critics. *See* K. MARX, GRUNDRISSE DER KRITIK DER POLITISCHEN OKONOMIE (1859); Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369; Gerety, *Iron Law: Why Good Lawyers Make Bad Marxists*, 26 NOMOS 196 (1983). "In . . . hermeneutics, then, theory is subsequent to that out of which it is abstracted; that is, to praxis." H. GADAMER, *On the Scope and Function of Hermeneutical Reflection*, in HERMENEUTICS, *supra* note 82, at 20. Gadamer has expanded on his ideas of the hermeneutic exercise of practice in his more recent work. *See, e.g.*, H. GADAMER, REASON, *supra* note 82.

> true belief, but theory is not just another name for practice. It is the name for all the ways people have tried to stand outside practice in order to govern practice from without. Our thesis has been that no one can reach a position outside practice, that theorists should stop trying, and that the theoretical enterprise should therefore come to an end.[99]

The practical effects of such a "theory" are, for lawyers, revolutionary. Rather than worry about discovering truth and meaning in semantic textual analysis aided by historical sources, we must constitute truth and morality in the practice of law—or, better still, in the practice of life. Belief encompasses all. Human flourishing, justice, morality must all be found in the practice of the human experience. We must develop a practical, sociological morality.[100]

Where are we to find the clues to this sociology? What are the sources of human experience? Are there canonical texts of societal desire?

B. *Solidarity and Freedom—The Problem of Secular Community*

The answer is at once simple, even self-evident, and yet complex. The canonical text of society is society itself. The existence of life inside and outside community is the text of life. Nonetheless, we must choose to stand somewhere—inside or outside—based on some prima facie belief. We must, because we

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99. Knapp & Michaels, *supra* note 97, at 741-42. Such statements are indicative of general malaise in the profession. According to de Man, resistance to theory is inevitable:

> Nothing can overcome the resistance to theory since theory *is* itself this resistance. The loftier the aims and the better the methods of literary theory, the less possible it becomes. Yet theory is not in danger of going under, it cannot help but flourish, and the more it is resisted, the more it flourishes, since the language it speaks is the language of self-resistance. What remains impossible to decide is whether this flourishing is a triumph or a fall.

de Man, *The Resistance to Theory*, 63 YALE FRENCH STUD. 3, 20 (1981). *See also* Fish, *Professsion Despise Thyself: Fear and Self-Loathing in Literary Studies*, 10 CRITICAL INQUIRY 349 (1983). The work of the realists has lead to a similar crisis in legal theory, a crisis which is now manifested by the pessimism of many critical legal scholars. *See generally* CLS *Symposium*, *supra* note 6.

100. *See* M. OSSOWSKA, SOCIAL DETERMINANTS OF MORAL IDEAS (1972); Harman, *supra* note 91. The search for *truth* then becomes, at the level of *praxis*, an attempt to convince others of our beliefs. "Convincing and persuading, without being able to prove—these are obviously as much the aim and measure of understanding and interpretation as they are the aim and measure of the art of oration and persuasion." H. GADAMER, *On the Scope and Function of Hermeneutic Reflection*, in HERMENEUTICS, *supra* note 82, at 24.

are human, view the book of life with a particular prejudice.[101]

We begin with an attempt to find the proper relation between individual and community. The human is a political—that is, social—animal. We live in community. We must examine the texts of particular, discrete communities in order to develop a larger hermeneutics of the American and of the human community.[102]

The tension between individual and community presents a complex dilemma. Closer examination again reveals the fallacy of attacking it on the theoretical level.[103] Individual and community are unseparated and inseparable. We are the texts which shape us just as we are the shapers of the texts. Language permits the hermeneutic dialogue and presupposes understanding. We understand and define both individual and communal existence through language. We attempt to appropriate our culture and define our being in the interaction of texts. We normalize and appropriate the community.[104] Our hermeneutics must begin with the language of culture, the dialogue of society for which we have no choice.

Under this practical framework, we can now question the validity of the existing hermeneutics. How successful have we been in incorporating individual and society in practice? What effect has the externality of part of our existence had on our ability to

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101. "Prejudice" here does not necessarily have a negative connotation. Hermeneutic inquiry demands that we recognize that interpretation is always projection. The interpreter appropriates the text to her own world experience, her own prejudice. The distinction is between human authority and hastiness. The interpreter must examine, rather than blindly accept, her preformed (i.e., historically imposed) judgments. After such study, a prejudice may be validated. *See* H. GADAMER, *supra* note 4, at 235-45.

102. For a discussion of the availability of numerous, non-statist texts to inform the legal hermeneutics, see Cover, *supra* note 59.

103. The work of Bakhtin is instructive. *See* M. BAKHTIN, THE DIALOGIC IMAGINATION (1983); J. KRISTEVA, *Word, Dialogue and Novel*, in DESIRE IN LANGUAGE, *supra* note 81, at 64-92; *Forum on Mikhail Bakhtin*, 10 CRITICAL INQUIRY 225 (1983).

104. *See* Cover, *supra* note 57 (drive for isolation and the avoidance of social "normalization"). Normality can be avoided by flight to poetic language. Poetry and the "carnivalesque" permit identity and separateness in isolation. *See* P. DE MAN, BLINDNESS AND INSIGHT (2d ed. 1983). While de Man sees poetic language as reflective of a perfect void, a flight from facticity, Kristeva sees the flight to poetic discourse as an attempt to define "the constituting struggle of language and society." J. KRISTEVA, *The Ethics of Language*, in DESIRE IN LANGUAGE, *supra* note 81, at 34. Similarly, the flight by legalists to abnormal discourse is the only way in which we can hope to truly redefine juridical debate and focus our vision on value. *See infra* note 130 and accompanying text (Rorty's theory of abnormal discourse). Like the poet, we must find ourselves "constantly risking absurdity and death." L. FERLINGHETTI, A CONEY ISLAND OF THE MIND (1958).

deal with our prejudices, to verify them? What has critical legal scholarship to offer to replace the fallacies of liberalism?

Problems of inclusion and exclusion have again come to the fore in legal scholarship. Recent articles by Cover[105] and Burt[106] demonstrate the crucial importance of such issues. Each, in his own way, argues that we can all be excluded unless our hermeneutics permit us to attempt reconciliation of fundamental disagreements. The interpretive framework of authority must permit discord *and* appropriation. Community cannot exist without isolation.[107]

These insights, with their reliance on the ideal of community, serve to explain, or to offer a frame of reference with which we can understand, the underlying premise of critical legal studies. The movement is characterized and differentiated from legal realism by its belief in, and attempts to justify, collectivism. It seeks to achieve a state of human flourishing by placing increased emphasis on the possibility of progress only with an increased sense of collectivity and community. Liberalism must perish because of the insular individualism which is its self-proclaimed touchstone.[108] The liberal vision cannot achieve harmony and advancement of the human condition in America.

Burt's and Cover's invocations of communitarian arguments alone do not enable us to understand the critical legal scholars. The Yale professors' recourse to Biblical and Talmudic sources to justify the importance of collectivity (or collectivities) does, however, provide the key. We need only refer to Unger's plea[109] and Tushnet's clearly stated belief[110] to see—or, more precisely, to believe—the fundamental premise on which critical legal scholarship is based: that to achieve a better world, the civil community must be consecrated. Redemption through community. We must imbue

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105. *See* Cover, *supra* note 57; Cover, *supra* note 59.

106. *See* Burt, *supra* note 76.

107. *See generally* Cover, *supra* note 57.

108. *See* Tushnet, *supra* note 1. *Cf.* Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495, 505 (1982).

109. "Speak God." R. UNGER, *supra* note 78, at 295. Parallels between communitarian (or even Marxist) theory and Christianity have been drawn before. *See, e.g.*, N. BERDYAEV, THE ORIGIN OF RUSSIAN COMMUNISM (1960).

110. *See* Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

civil society with the faith and fervor of religious community.[111] Unger wishes to appropriate the sense of nation which binds religious groups and invoke its cohesive power in the secular world. We must believe in the truth of the way. We must be consecrated. The potential beneficial impact of critical legal studies must be examined in this light. Can their "belief about belief"[112] be valid?

The validity of this belief must be examined from two distinct, but related, perspectives. First, as a matter of theory, we must question whether this call to a secularization of the idea of religious community is consistent with the critical tradition, especially with its Marxist roots. Second, we must question whether it is practical—or rather, whether it is possible. What are the chances for the implementation of such a new vision in America?

The idea of religion, with its concomitant vision of community, is pervasive in Western culture. Not only should the left capture this ground, it must capture this ground as a theoretical prerequisite to any hope of a practical implementation of progressive ideals. The achievement of a secular community is essential to the success of the critical project. Religion *is* the key to this success. More precisely, the religious experience, and the language of religious experience, provides valuable insights into the process of democratizing the hermeneutics, leading to the reconstitution of civil community. Unger's vision, while inspiring, seems nonetheless incomplete, perhaps even paradoxical.

In *Knowledge and Politics*, published a decade ago, Unger's theory, with all its liberating vision, falls victim to the trap of hierarchy and authority: The creation of a secular community is catholic and Catholic. While calling for a total critique and world vision, Unger's proposal relies in essence on a priesthood. It cannot be realized without a hierarchical order of individuals who are the first to see the light of revelation. These are those few individuals capable of conceptualizing and concretizing Unger's vision of total critique. From them others will learn and follow. But the first will

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111. *See* Tushnet, *Truth, Justice and the American Way*, *supra* note 78.

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> In our view . . . the only relevant truth about belief is that you can't go outside it, and, far from being unlivable, this is a truth you can't help but live. It has no practical consequences not because it can never be *united* with practice but because it can never be *separated* from practice.

Knapp & Michaels, *supra* note 97, at 741.

retain their preeminent position; they are the rock upon which the Church is built.

That such a vision blocks community is obvious. The idea of a redeemed secular society reverts to the ancient orderings of priesthood and inherent contradictions to such an extent that it must fail.

This impressionistic account of Unger would, if accepted, lead to despair over the possibility of ever forming a new vision of collective existence. This most persuasive critique of liberalism would be doomed to failure, and any sense of "we" with it. But Unger has not abandoned his hope. In *Passion: An Essay on Personality*, which was published last year, he returned with a vigorous plea for a renewed attempt to achieve a unity of individuals in a renewed community. He calls for a new, liberating psychology of passion to deal with the "problem of solidarity."[113] According to this new version of Ungerian community, faith, love, and hope will redeem us.

Unlike that of *Knowledge and Politics*, such a vision is protestant and Protestant. It is clearly a call to protest, an invocation that we remain open to a larger vision of human potentiality. It is also a highly Protestant vision of salvation. No longer is the Church to be built on the rock of an enlightened few. No longer is hierarchy the door to the path of redemption. The act of consecration becomes an individual one. The way is in the mind—a new psychology, a willingness to open up before the Other, a decision of vulnerability.

The parallel with the Protestant vision of the act of personal acceptance of the Lord is remarkable: The confession of our own lowly, sinful, individual status as Self; acceptance by the Other; redemption. Peculiar and personal salvation through union with

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113. R. UNGER, PASSION: AN ESSAY ON PERSONALITY 20 (1984):

> To satisfy our longing for acceptance and recognition, to be intimately assured that we have a place in the world, and to be freed by this assurance for a life of action and encounter, we must open ourselves to personal attachments and communal engagements whose terms we cannot predefine and whose course we cannot control. Each of these ventures into a life of longing for other people threatens to create a craven dependence and to submerge our individual selves under group identities and social roles.

Id. at 20. In other words, community is essential to our existence as individuals, while at the same time potentially threatening to our very same existence. *Passion* attempts to demonstrate how this threat can be successfully encountered and community and individual both preserved and permitted to flourish.

God—this is the very root of Protestant theology. The church of God is made up of individuals, with unique, unmitigated relationships with the godhead. Unger has abandoned the priesthood to seek salvation in an act of individual contrition. He has left hierarchy in search of truth.

The abandonment of hierarchy for truth by one scholar, even one of Unger's quality, does not finally answer the question of the validity of a call for a religio-secular revival. Indeed, if it were conclusive, we would have returned to the ugliest form of hierarchy: the cult of personality. Unger's apparent conversion does, however, give a clear indication of why the return to religiosity is not evil per se. This indication is to be found in the methodology of his conversion. A vulnerability is required, an openness to the Other, to others. It is clearly hermeneutic. Salvation is a goal achieved through a process which is open and which has as its goal the positive improvement of our being in society. The concept of human society remains flexible and available for change.

Nonetheless, a process of salvation, even if acceptable from a critical perspective, raises other difficulties. Surely the opiate of the masses seems incongruous with any theory inspired by Marx.[114] Yet while Marxist theory suffers from fundamental problems, particularly in the American context, its relation to religion is not one of them.[115] It is not my intention to review here the myriad and complex interactions between Marxist theory and theology. Brief reference to the work of Walter Benjamin will suffice to show that the left can little afford to abandon and reject religious ideology.

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114. As discussed *infra*, critical theory, particularly a critical legal theory, which is overtly Marxist must confront other serious difficulties.

115. Marx himself offers a crucial insight into the inter-relationships between law, religion, and politics. He states:

> The first task of philosophy, which is in the service of history, once the holy form of human self-alienation has been discovered, is to discover self-alienation in its unholy forms. *The criticism of heaven is thus transferred into the criticism of earth, the criticism of religion into the criticism of law, and the criticism of theology into the criticism of politics.*

K. MARX, *Towards a Critique of Hegel's Philosophy of Right: Introduction*, in SELECTED WRITINGS 64 (McLellan ed. 1977) (emphasis added).

C. *Secularizing the Revolution—Walter Benjamin's Dialectic Religion*

Theology was clearly a major inspiration for Benjamin, one of the most innovative of the Frankfurt School thinkers. The particular influence of Jewish scholarship, especially the intriguing interpretive strategy of the Kabbalah,[116] is well-documented. The whole process of historical materialism in general, and its historicist methodology in particular, was for Benjamin impossible to conceive in a way which was "thoroughly a-theological."[117] Benjamin could not proceed by ignoring theology because theology and critical theory shared, and continue to share, a common goal, the redemption of humankind. Critical theory has always been a liberation theology. While the reasons necessitating redemption, and the path to be followed, differ, each shares with the other an historical, social, and political heritage and context.

More important than the shared history and context—and growing out of them—is shared language. Yet this language has been shared in unequal portions. Because it was constituted first, and because it has managed to spread its mythology beyond the realm of pure religion into quotidian secular existence, theology appears to have a claim on the vocabulary of redemption and salvation. Critical theory has suffered from a temporal disadvantage, as well as ideologically based hesitancy,[118] which have prevented it from making use of this powerful lexicon. While such hesitancy may be understandable at one level, it remains in contradiction to much of critical theory, particularly with the idea of immanent critique. If the potentiality for radical change exists in society, it must remain immanent in the linguistic-grammatical structures of

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116. *See* G. SCHOLEM, WALTER BENJAMIN: THE STORY OF A FRIENDSHIP (1984). For a good introduction to the Kabbalah and its relationship to criticism, see H. BLOOM, KABBALAH AND CRITICISM (1984).

117. Benjamin, *N[Theoretics of Knowledge; Theory of Progress]*, 15 PHIL. F. 1, 19 (1983-1984). Benjamin was not the only Frankfurt School member to recognize the necessity of theology to the critical project. Adorno outlined his position as follows: *Philosophie, wie sie im Angesicht der Verzweiflung einsig noch zu verantworten ist, wäre der Versuch, alle Dinge so zu betrachten, wie sie vom Standpunkt der Erlösung aus sich darstellan.* (The only philosophy defensible in the face of despair would be that which attempts to look at all things as they present themselves from the standpoint of redemption). T. ADORNO, MINIMA MORALIA 333 (1970) (author's translation).

118. For an example of an ideologically inspired reluctance to seek solace in religion, see G. SPIVAK, *The Politics of Interpretations*, in THE POLITICS OF INTERPRETATION 347 (W.J.T. Mitchell ed. 1983).

that society.[119]

Given the overt and covert power of the religious experience, it is not surprising then that Benjamin would seek to recapture the language of theology. The liberating vision of Frankfurt School Marxism could only profit from a secularized redefinition of this vocabulary. The role of critical theory, as Benjamin saw it, is to take control of history and make it available to the proletariat by redefining history in the language and the experience of the oppressed and not in that of the "winners."[120] To ignore the power of theology and its lexicon would have been, for Benjamin, a betrayal of the workers. His goal was to secularize "redemption" and to give it practical force in the service of dialectical materialism.[121]

Like Benjamin, we cannot afford to ignore the power of religion and theology. The left cannot allow such a powerful tool[122]

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119. On deconstructing particular aspects of theology, see Derrida, *Of an Apocalyptic Tone Recently Adopted in Philosophy*, 6 OXFORD LITERARY REV. 3 (1984).

120. Benjamin's goal was to dissolve mythology so that the forces of revolutionary change could be actualized by "the awakening of a knowledge of the past that is not yet conscious." Benjamin, *supra* note 117, at 3. Such an awakening would permit victory in the class struggle.

121. Despite Benjamin's innovative perspective, his faith in historical materialism and the dialectic of Marx was undoubting—i.e., "uncritical." *See* Tiedemann, *Historical Materialism or Political Messianism? An Interpretation of the Theses "On the Concept of History"*, 15 PHIL. F. 71 (1983-1984). Tiedemann summarizes Benjamin's position: "Historical materialism 'enlists the services of theology': it is in control. Theology is the servant who must do the work—who must take care of the thinking, so to speak." *Id.* at 85. For his analysis of the poverty of Kantian notions of experience, see Benjamin, *Program for the Coming Philosoph*, 15 PHIL. F. 41 (1983-1984). For Benjamin, theology can capture and supply a more complex notion of experience, opening a greater hermeneutic background for reconstituted society. This broadened complex notion of experience is clearly expressed; *see* W. BENJAMIN, *On Some Motifs in Baudelaire*, in ILLUMINATIONS 155 (1973). Perhaps Benjamin's desire to enlist theology in the service of the revolution is best seen in the following example:

> The story is told of an automaton constructed in such a way that it could play a winning game of chess, answering each move of an opponent with a countermove. A puppet in Turkish attire and with a hookah in its mouth sat before a chessboard placed on a large table. A system of mirrors created the illusion that this table was transparent from all sides. Actually, a little hunchback who was an expert chess player sat inside and guided the puppet's hand by means of strings. One can imagine a philosopical counterpart to this device. The puppet called "historical materialism" is to win all the time. It can easily be a match for anyone if it enlists the services of theology, which today, as we know, is wizened and has to keep out of sight.

W. BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra*, at 253.

122. José Casanova offers an intriguing example of how the current resurgence of

to be used against it. The vision of individual and community is uniquely suited to the linguistic-grammatical world of theology. It must be recaptured and given a practical, secular content without losing the fervor-inspiring potential which is so often part of the language of redemption. But it is at this level of practical implementation of the secularized, consecrated community that the left in America has encountered its greatest difficulties. We must now turn to the most coherent left theory, Marxism, to examine the reasons for this failure. In particular, the writings of Mark Tushnet are important for critical legal theory, for they provide the clearest openly declared vision for American socialism.

III. Constructing a Value-laden Hermeneutics

A. *Marxism in America—Recapturing the Dream*

Tushnet's hermeneutic framework is teleological; for Tushnet, whatever will advance the cause of socialism is good.[123] This simplified statement of belief points out the fundamental practical weakness of Marxist thought in America. Two questions spring to mind. What is good for socialism? Why is socialism good for America?[124]

Important questions remain unanswered in critical legal scholarship and Marxist thought in general. Which Marxism are we to adopt? Debates among Marxists about the *truth* remain as diverse and as controversial as debates among Christians concerning the true meaning of the Bible. Is there, for example, a Marxist theory of free speech?[125] Should we accept press censorship in

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interest in religion might provide certain elements for a progressive political revival. *See* Casanova, *The Politics of the Religious Revival*, 15 Telos 3 (1984).

123. Tushnet, *A Marxist Analysis of American Law*, 1978 Marxist Perspectives 96; Tushnet, *Is There a Marxist Theory of Law?*, 26 Nomos 171 (1983) [hereinafter cited as Tushnet, *Marxist Theory of Law?*].

124. Professor Tushnet feels pessimistic about the practical possibility of a socialist America. More important, he is doubtful about the practical possibility of a Marxist theory of law. Despite his pessimism, he remains hopeful in spirit.

125. Tushnet might reply that the category "free speech" has been defined too narrowly to permit the development of proper Marxist theory. Tushnet, *Is There a Marxist Theory of Law?*, *supra* note 123, at 171. *But cf.* Lipson, *Is There a Marxist Theory of Law? Comments on Tushnet*, 26 Nomos 119 (1983). For an interesting, eclectic, analysis of Tushnet's Marxism, see Nash, *In Re Radical Interpretations of American Law: The Relation of Law and History*, 82 Mich. L. Rev. 274, 314 (1983). *See generally* L. Jawitsch, The General

Nicaragua? Can we differentiate between the necessity of such actions in order to consolidate the gains of the revolution and the desirability of censorship under the first amendment in modern America? Before critical legal theory can hope to be persuasive in the regulated marketplace of ideas,[126] it must be able to define and elucidate its position. The fact that the abandonment of theory leads to belief does not eliminate the requirement of persuasion. Conversion to the left will result in part from the intuitive appeal of its position and in part from "rational" debate about values.

Rational criticism of liberalism exists as the major strength of critical legal studies. A viable developed alternative on the left is still missing. Failure to provide what at least appears to be a systematic response leads to acceptance of the critics' view of liberalism. Nihilism which offers no viable alternative is dangerous.

A related failure of the American left is its inability to persuade us of the desirability of (an as yet undefined) socialism. Why is a Marxist hermeneutics useful? How will it open human experience to greater and greater potentialities? References to Gramsci's theory of hegemony in advanced capitalist society provide evidence of a willingness to engage in a hopeful enterprise.[127] But do they persuade? Why is Gramsci's description of capitalism in the 1920's persuasive in the America of the 1980's? Can we advance from a somewhat abstract conception of the hegemonic tendencies of American society to full or partial explanation of the continuing viability of liberal capitalism and the Western legal tradition? A teleological construct with practical, political appeal is essential to success, particularly since examples of Marxism in ac-

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THEORY OF LAW (1981); E.B. PASHUKANIS, LAW AND MARXISM, A GENERAL THEORY (1978). Recent British work may also be instructive. *See, e.g.*, LEGALITY, IDEOLOGY AND THE STATE (D. Sugarman ed. 1983). Perhaps the time has come to throw off the "Marxist" label. We appear to spend an inordinate amount of time arguing whether a "Marxist" can, or should, believe in rights. *Compare* Lukes, *Can a Marxist Believe in Rights?*, 1 PRAXIS INT'L 334, 337 (1982) (*no*) *with* Cornell, *Should a Marxist Believe in Rights?*, 4 PRAXIS INT'L 45, 55 (1984) (*yes*). Rather than spending our days searching the archives for a supporting quote from Marx, we should simply recognize that "our" philosophy is one of spirit, not of dogmatic adherence to the writings of one man. Labels are not only unimportant, they are restrictive.

126. This, of course, is traditional liberal imagery. Since transcendance at this level is impossible, we must always operate to a certain extent within the historical (liberal) framework.

127. Taylor, *Deconstructing the Law* (Book Review), 1 YALE L. & POL'Y REV. 158 (1982).

tion are more than disappointing.[128]

Perhaps appeal to the "inherent" justice and equality of a socialist economy has an intuitive appeal. Indeed, American liberal democracy has survived because of its ability to appropriate large lumps of "socialist" solutions to societal problems. The left must justify its contention that we will be "better off" if we go all the way.

What can the left do to maintain and improve its position as a viable "theoretical" alternative to liberal legalism? First and foremost, it must reply effectively to the most telling criticism levelled against it: that its view is a flight "to excessive romanticism."[129] The reply proposed here is at once clearly available and extremely dangerous. The tension between what is and what could be must be accentuated. We must, as a matter of *praxis*, engage in discourse inside the American community, but we must do so from a stance which supports the "abnormal." The left must propose a plan, a hermeneutics, which is purposive and purposefully edifying—a challenge to the normality of life and of law. "For edifying discourse is *supposed* to be abnormal, to take us out of ourselves by the power of strangeness, to aid us in becoming new beings."[130]

We must at once open up and close down the hermeneutic possibilities. Exclusion and reform are at once desired and permitted. Abnormal discourse from the left must have the courage of its convictions. It should aspire to clearly define its discourse in terms of its *beliefs* and world vision. It will remain open to the many sources of textuality which constitute human existence while it must reject the pluralist vision of liberalism. It must, in other

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128. It has been suggested that motherliness may offer a more positive, micro-example of Marxism in action. The accuracy of this contention, without a more complete formulation, raises complex and interesting questions. *See* Fitzpatrick, *Marxism and Legal Pluralism*, 1 AUSTL. J. L. & SOC'Y 45 (1983).

129. Shiffrin, *supra* note 70, at 1110. While Shiffrin's analyses are insightful and helpful in many respects, ultimately he fails to convince the reader that his "eclectic liberalism" is either ontologically superior to, or a "better" practice than, "ecletic Marxism." The only strength of his approach is that of liberalism in general: it is *the* powerful, historically dominant ideology. His appeal appears to be to a *theory* the main strength of which is practical hierarchical superiority.

130. R. RORTY, *supra* note 7, at 360. *See also* R. RORTY, CONSEQUENCES OF PRAGMATISM (1982). The Russian formalists saw this as the key function of literature. For an example of the application of this notion of abnormal discourse as edifying project to modern American literature, see Smith, *Performing in the Zone: The Presentation of Historical Crisis in Gravity's Rainbow*, 12 CLIO 245 (1983).

words, express its willingness to exclude, on the basis of belief, certain individuals and communities from the end-community toward which it strives. Nazis (to pick a familiar example) must be rejected. The "prejudice" against them must be convincingly presented and their exclusion firmly maintained.

The dangers of such a strategy are clear. We risk mistaken exclusion. We risk unjustifiable and unconvincing belief. Such risks, within a proper hermeneutic framework, can be minimized. We must avoid the "neutrality" of liberalism. At the same time, our political position must be open to divergent points of view. If it is to be socialist, it can not be doctrinaire. The greatest danger, however, remains the strength of the practice of liberalism and its support of an apparently value-free, rational normality. Abnormal discourse, to be effective in reality, must be normalized. The incommensurable becomes commonplace. The left is co-opted and liberalism strengthened.

Edifying discourse remains the only alternative to a collapse into nihilism. Legal scholarship, liberal and critical, now has reached its "moment of decadence."[131] We have realized the inherent contradictions of existing constitutional theories. We must avoid normalization and recapture. We, as legal thinkers, operate within a sphere of interpretation where authority is decided by structure and where normality is determined by the authority of the profession. Critical legal scholarship offers us the opportunity to develop a healthy mistrust of our profession and of professionalism and theory in general.

While we attempt to escape the gravitational pull of "the system" and the profession, we realize that we can never fully withdraw. Being outside is referential; it is defined and determined by the inside.[132] Any attempt to deconstruct includes involvement in the system. But all hope is not lost. We must recognize that deconstruction is necessary, that the "point of incision"[133] is one chosen

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131. More specifically, legal scholarship has been "simultaneously destroyed and destructive, *destructuring*, as is all consciousness, or at least the moment of decadence, which is the period proper to all movement of consciousness." J. DERRIDA, *supra* note 51, at 6.

132. J. DERRIDA, *supra* note 5, at 10; J.P. SARTRE, *supra* note 52, at 238.

133.

> The *incision* of deconstruction, which is not a voluntary decision of an absolute beginning, does not take place just anywhere, or in an absolute elsewhere. An incision, precisely, it can be made only according to lines of force and forces of rupture that are localizable in the discourse to be deconstructed.

of belief. It is a fundamentally political choice which, as a dialectic, even as potentially hegemonic dialectic, as it unfolds, we must take in order to escape normality. At this stage then, first-level *praxis* must involve the development of a vision of society, and of "practical" alternatives, which, while seemingly "abnormal," are discernably possible. A theory of a reconstituted society in which an open hermeneutics can exist is required. The goal of this first-level *praxis*, then, is to restructure, in theory and practice, our communal existence. The project is large, indeed global. The alternatives are resignation and nihilism.

B. *The Future: Pessimism v. Optimism*

Readers may reply: "We accept the failures of both liberalism and critical legal scholarship. Concern with majoritarianism, in whatever form, is misplaced. Detailed theories which grant canonical status to hierarchy falsify and obstruct our discussions about value. What have you offered? Critical legal scholarship has not defined or convinced others of its framework. What system do you offer for *praxis*?"[134]

The reader is correct. *The* answer is not offered here—nor, even, is *an* answer. Rather, Marcuse's hermeneutics could be invoked.

> (1) The transcendent project must be in accordance with the real possibilities open at the attained level of the material and intellectual culture.
>
> (2) The transcendent project, in order to falsify the established totality, must demonstrate its own *higher* rationality in the threefold sense that
>
> (a) it offers the prospect of preserving and improving the productive achievements of civilization;
>
> (b) it defines the established totality in its very structure, basic tendencies, and relations;
>
> (c) its realization offers a greater chance for the pacification of existence, within the framework of institutions which offer a greater chance for the free development of human needs and faculties.
>
> Obviously, this notion of rationality contains, especially in the last statement, a value judgment, and I reiterate what I stated before: I believe that the very concept of Reason originates in this value judgment, and that the con-

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J. DERRIDA, POSITIONS 82 (1981) (emphasis in original).

134. Such a project is beyond the scope of this paper. The present goal is only to point out the sterile nature of current constitutional scholarship. The next synthetic stage of development must be true discussion of values (e.g., people must be fed, workers must control the means of production and exchange).

cept of truth cannot be divorced from the value of Reason.[135]

The invocation of the Marcusian framework as that upon which critical (legal) *praxis* should be built raises the crucial issue of whether optimism or pessimism should be the dominant ideological mindset of the left. The debate between the two views has waged for many years[136] and has centered again on the possibility of immanent critique and change in advanced Western society.

According to the optimistic view, of which Habermas and Marcuse are the most famous proponents, modern capitalism contains within it the seeds of its own destruction and the flowering of the new age. While disavowing the blatantly erroneous vision of classical, automatic Marxism of the proletariat as the revolutionary class,[137] the optimists of the Frankfurt School nonetheless maintain faith in the dialectic.

On the other hand, the pessimists, of whom Adorno and Horkheimer,[138] are the most typical, have never been fully convinced of the possibility of positive, emancipatory change. While sharing with the optimists the general theories of the failings of modern society, they remain overwhelmed by the incredible staying power of liberalism. They are unable to truly believe that qualitative change can be obtained in a cultural matrix where the dominant structures and ideology are so flexible and capable of such large quantitative change. If the proposal for a newly consecrated secular hermeneutics is to have any validity, the optimist-pessimist debate must be dealt with and some tentative solution offered.

Habermas, with his theory of the availability of a general

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135. H. MARCUSE, ONE-DIMENSIONAL MAN, *supra* note 3, at 220. The relationship between hermeneutics and critical social theory has yet to be fully developed.

136. For an introduction to the various points of view, see generally Arato, *Immanent Critique and Authoritarian Socialism*, 7 CAN. J. POL. & SOC. THEORY 146 (1983); Habermas, *Some Conditions for Revolutionizing Late Capitalist Societies [1968]*, 7 CAN. J. POL. & SOC. THEORY 32 (1983); Habermas, *History and Revolution*, 10 TELOS 5 (1979); Honneth, *Communication and Reconciliation: Habermas' Critique of Adorno*, 10 TELOS 43 (1979); Lefort, *On the Genesis of Ideology in Modern Societies*, 7 CAN. J. POL. & SOC. THEORY 43 (1983); Raulet, *What Good is Schopenhauer? Remarks on the Horkheimer's Pessimism*, 11 TELOS 98 (1980).

137. This is particularly true of Marcuse's hope in the revolutionary potential of the student agitation during the Vietnam War and the alleged unity of the interests of students and workers which was invoked in the heady aftermath of events in France in May 1968. *See* H. MARCUSE, COUNTERREVOLUTION AND REVOLT (1972).

138. *See* Adorno & Horkheimer, *supra* note 3.

communicative action and rationality,[139] would appear to offer an obvious solution. Indeed, his work has clearly influenced much of today's left scholarship, including the endeavours of critical legal studies.[140] Unfortunately, Habermas's optimism is difficult to accept. True, one readily can accept his view that the state, or the public sphere,[141] must be truly democratized so that a new form of hermeneutic debate and reflection can take place. Nevertheless, there appears to be a fundamental flaw in Habermas's own historical theory.[142] This theory is based on a close analysis of the emergence of the modern democratic state and relies in particular on the proposition that a politically active public, consisting of individuals distinct from the official state apparatus, constituted, in an open communicative practice, the universalization of those norms which we now associate with Western democratic ideals. For example, constitutionally guaranteed rights of free speech had the potential of being truly democratic because they were realized and implemented through a relatively open reflective communicative practice, in a public sphere in which the state did not necessarily interfere. Their social base simply had to be extended for democracy to be more fully realized.

The rise of the welfare state and late modern capitalism has, however, undermined Habermas's argument that a particularly active public, engaged in an open discussion and articulation of values, is immanent in our society. The rise of interest groups, as a concomitant development of the appropriation of the public sphere and state apparatus by private agglomerations, with non-

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139. *See* J. HABERMAS, *supra* note 3; 1 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1984).

140. *See, e.g.*, Sumner, *Law, Legitimation and the Advanced Capitalist State: The Jurisprudence and Social Theory of Jurgen Habermas*, in LEGALITY, IDEOLOGY AND THE STATE 119 (D. Sugarman ed. 1983).

141. Some writers do not portray Habermas as an eternal optimist. Peter Hohendal argues that Habermas shares Horkheimer's pessimism. Hohendal's view (a Marxist instrumentalist one) is premised on the existence of a proletarian public sphere which contains great potential disruptive force; he claims Habermas denies this sphere. *See* Hohendal, *Jürgen Habermas: "The Public Sphere" (1964)*, NEW GERMAN CRITIQUE, Fall 1974, at 45. This is an accurate description in the sense that Habermas cannot be classified as a "Marxist," in the classic sense. This does not, however, lead to the conclusion that Habermas is a cultural pessimist. For Habermas, a potentially public sphere *does* exist; it is simply not a proletarian one.

142. This section of the Article was inspired largely by the work of Jean Cohen. *See* Cohen, *Why More Political Theory*, 12 TELOS 70 (1979).

universal claims to values, has meant that the same public sphere, the key to Habermas's liberating immanent critique, has been reduced to a private battleground. The institutional basis on which a free hermeneutics could be built no longer exists. Habermas has been reduced to utopian claims.[143]

Such a bleak view is frightening. If an open, public hermeneutics is impossible, if it is blocked by an ultimately inflexible institutional practice and structure, we will soon be reduced to nihilistic abandon. This fear of nihilism has lead to recent attempts to rescue immanent critique from its apparent fate. Of such attempts, two are of particular interest. Each in its own way points toward a third path to effective critical theory and, ultimately (with faith, love, and hope), to redemption.

C. *Three Paths to a New Heresy*

1. *Retracing a False Path.* The first attempted resurrection of critical thought is one which appears to have had a profound effect on critical legal theory. This first path—clearly part of Tushnet's project—tries to explain why Marxism has remained a marginal activity in America. Once an explanation is proffered, it tries to construct a way in which this ideology can move closer to mainstream thought and practice. In its strongest manifestation, it argues (largely inspired by Weberian sociology) that certain myth-structures and symbols which form the psychic heart of America contain an element of progressivity from which we can construct an immanent critique and plan for future action. Trent Schroyer has labeled this "cultural surplus."[144]

Schroyer's theory is a derivative of Habermas's discussion of "the public sphere." Schroyer contends that while theoretically Habermas was correct, his analysis of the bankruptcy of natural law and the republican tradition is, in the American context, wrong. These post-Habermasian proponents of the idea of cul-

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> [I]t is not surprising that Habermas can offer only an abstract alternative of the present organization of late capitalism, for on the basis of his original analysis of the decline of the public realm, he can neither situate his utopia of political freedom nor identify a dynamic pressing towards its realization.

Cohen, *supra* note 142, at 82.

144. Schroyer, *Cultural Surplus in America*, NEW GERMAN CRITIQUE, Spring-Summer 1982, at 81. He defines "cultural surplus" as those "traditional cultural symbols that retain their capacity to anticipate utopian alternatives to existing realities."

tural surplus argue in support of the strength and liberating potential of a certain social mythology. "Equality," as an essential element of the American dream, would be part of the cultural, symbolic surplus from which it would be possible to build a theory of "real" equality—that is, socialism. Much of the work of critical legal studies can be seen as an attempt to use the law, especially the Constitution, as a concrete manifestation of this cultural surplus. Thus, argues Schroyer, the mythology of equality, put into practice in the desegregation of official structures, can be used to achieve further qualitative improvement, leading eventually to a society constructed on socialist principles.

Such a vision of the law suffers from several difficulties. It relies in large part on the maintenance of a hierarchical court structure. Moreover, because of its incremental and instrumentalist elements,[145] it follows the fate of all other immanent critique: it cannot deal adequately with the power with which the institutions and practices of modern capitalism are able to confront societal myth. In other words, the cultural surplus, when recognized as such in practice, can be just as easily exploited by the existing ideology for its own purposes. The language, myth and symbolism of the surplus are simply incorporated by an existing power and are used to block hermeneutic freedom.

2. *The Second Path: Power and Failure.* Since the institutional power structure, with its own mythology, appears to trump any use of myth as a source of liberation, some have followed a second path to immanent critique: resurrecting the work of Michel Foucault[146] for implementation in a leftist agenda. However, the manner in which Foucault is being used is surprising; ultimately, it will undermine the effort. From this failure, however, will grow a liberating vision of effective critique.

Foucault's views are extremely complex but relatively well known; no attempt will be made here to provide the definitive en-

145. For a good introduction to the problems inherent in such views, see Tushnet, *Marxism as Metaphor* (Book Review), 61 CORNELL L. REV. 281 (1983).

146. *See, e.g.*, M. FOUCAULT, POWER/KNOWLEDGE (1980); M. FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1970). Typical of the machinations necessary for this attempted resurrection are, Rajchman, *Foucault's Dilemma*, SOC. TEXT, Winter 1983-1984, at 3, and Dews, *Power and Subjectivity in Foucault*, NEW LEFT REV., Mar.-Apr. 1984, at 70. For a critical rejection of the applicability of Foucault to current, concrete struggle, see Rorty, *Habermas and Lyotard on Post-Modernity*, 4 PRAXIS INT'L 32 (1984).

capsulation of them. For present purposes, it is important to note a few, perhaps oversimplified, basics: Foucault sees all social and personal relations as revolving, necessarily, around power and subjugation. The radical discontinuities (which he finds in human history and which lead him to reject dialectical materialism) can be explained by reference to subjugation. Power is found in many forms—from overt physical domination to the existing modern form of a societal ideology which creates self-administered subjugation.[147]

The fundamental difficulty with any attempt to resurrect Foucault for a practical, leftist critique is that his views lack a coherent starting point. While Foucault may have shared, by intuition, many goals with the left, his mistrust of all ideology prevented him from developing a coherent framework upon which others could build. Foucault believed that we must distrust all ideology and power. In Foucault, there is neither a normative base nor a political theory from which we might draw practical guidance. All relationships are oppressive, all forms of interaction involve subjugation and power. In the end, there is no ground for criticism or for preferring one form of freedom over another because there is no freedom. Marxist visions of liberation are as false and as power-dominated as are Fascist ones. If we need more political theory we will not find it in Foucault. Yet those who see in Foucault hope for a radical *praxis* are not far wrong. For it is in Foucault's unrelenting mistrust of power that we can find the ideas which will permit the development of the new secularized fervor.

3. *Desire.* In the preface to the English-language version of *Anti-Oedipus*,[148] Foucault offers the opinion that Deleuze and Guattari present a program for anti-fascist living. He repeats his warning that we must not become enamored of power and argues for the constitution of a new community, one which "must not be

147. In this view of modern society, Foucault draws remarkably close to the theories of the Frankfurt School. *See generally* Raulet, *Structuralism and Post-Structuralism: An Interview with Michel Foucault*, 16 TELOS 195, 200 (1983).

148. Foucault, *Preface* to G. DELEUZE & F. GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA at xiii (1983). The second volume of *Capitalism and Schizophrenia*, G. DELEUZE & F. GUATTARI, MILLE PLATEAUX: CAPITALISME ET SCHIZOPHRÉNIE (1980) is not available in English. *But see* G. DELEUZE & F. GUATTARI, ON THE LINE (1983) [hereinafter cited as ON THE LINE]; F. GUATTARI, MOLECULAR REVOLUTION: PSYCHIATRY AND POLITICS (1984).

the organic bond uniting hierarchized individuals."[149] The "political" theory presented by Deleuze and Guattari is that of desire. Like Foucault's earlier vision of power and subjugation, however, desire cannot, by itself, form a political theory. As Deleuze and Guattari themselves recognize, desire contains within its general nature two opposed potentialities. The first of these, the "molar" personality, leads to fascism.[150] The second, the "molecular" personality, when actualized, leads to freedom—and, when combined with a broader social theory, to socialism.

The question which presents itself, then, is this: How can the American left permit the realization of desire in its molecular form? How can we achieve this liberation of the individual if immanent critique is, if not impossible, not presently conceivable?

In the remainder of this Article, a proposal for personal action will be set forth.[151] It echoes the notions of secularized religion and abnormal discourse,[152] and that the liberating vision of desire is present in theology. The notion of abjection and horror which presents itself when we recognize the problem of solidarity, when we recognize the I/Other separation into which we are thrown by our existence, is potentially reconcilable through salvation.

Desire, in its liberating form, is threatening to existing ideology simply because desire attacks that ideology at its very foundation, the I/Other dichotomy.[153] A vision which permits us to ap-

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149. Foucault, *supra* note 148, at xiv.

150. "Groups and individuals contain micro-fascisms that only ask to be crystallized." G. DELEUZE & F. GUATTARI, *Rhizome*, in ON THE LINE, *supra* note 148, at 18.

151. This portion of the Article has been influenced by the work of Julia Kristeva. *See* J. KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION (1982). The influence is manifested as impression rather than accurate reflection.

152. *See supra* note 130 and accompanying text. The idea of abnormal discourse here takes on a slightly more anarchic tone. Abnormal discourse at this level is meant to serve as a complement and counter-weight to first-level abnormal discourse. It is an aggravated form, a mutation. At this level, moreover, abnormal discourse remains highly individualized and largely ineffective. Because true freedom comes only when the molecular revolution can take place in the context of a broader reconstitution of civil society, the development of a social theory remains the larger, primary task.

153. A secular religion based on the right desire becomes the ultimate form of subversion because it is based on an alien psychology. Deleuze offers the following hopeful perspective:

> Instead of betting on the eternal impossibility of the revolution and on the fascist return of the war machine in general, why not think that *a new type of revolution is becoming possible*, and that all kinds of mutant machines are alive,

proximate an I/Other union, to form a community of desire, is destructive of current power bases. As Kristeva points out,[154] however, the strength of religion has been its ability to "hierarchize" the vision of desire and to sublimate the union by changing its nature from one of present human community to one of divine and future community (the Kingdom of God). Thus, religious hegemony resembles liberal hegemony, of which it is part.

It is here that we must return to abnormal discourse. We must allow desire to be used in the service of liberation. If we recapture the language of redemption and salvation, we will have taken the first step. The next step, the one which remains problematic, is the adaptation of abnormal discourse to the idea of redemption.

CONCLUSION: ABNORMAL DISCOURSE—IN FAVOR OF HERESY

Abnormal discourse, if it is to escape totalizing and repressive dialogue, must become heretical. We cannot sit atop a pillar year after year, nor will wearing a hair shirt lead to the subversion of the present structure. We must invent new forms of heresy and ascetic vision.[155] We must engage in acts of "moral terrorism"[156]

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engaged in warfare, joining one another, and tracing a place of consistence that undermines the organizational plan of the World State?

G. DELEUZE, *Politics*, in ON THE LINE, *supra* note 148, at 113.

154. *See* J. KRISTEVA, *supra* note 151, at 90-112.

155. The socio-historical context calls for a newer version of the ascetic goals of our generation. They are perhaps best summarized by a character from a Leonard Cohen novel: "Do you know what the ambition of our generation is, Wanda? We all want to be Chinese mystics living in thatched huts, but getting laid frequently." L. COHEN, THE FAVOURITE GAME 192 (1963).

156. Moral terrorism seeks to avoid reform at all costs. For example, in the academy, rather than encouraging our students and colleagues to engage in left-wing study groups, where they can escape from the mysteries of trespass on the case to the inherent clarity of Derrida's *Of Grammatology*, we should encourage them to learn a socially useful trade—playing the piano, for example—and to abandon law school forever. We can disrupt faculty meetings with various acts of civil or, preferably, uncivil disobedience. We can engage in subversion by memorandum. The possibilities are limited only by the available concepts of the absurd.

Several objections could be raised against this version of moral terrorism; especially that it is juvenile. This is true. It *is* juvenile. The very point of moral terrorism is to permit us to recapture the halcyon days of our youth, when freedom was an unquestioned component of our daily existence. A perpetuation of childhood or adolescence can have a highly liberating effect. Besides, it really bothers the liberals.

It is important to place the entire practice of abnormal discourse in its proper context.

in the name of community. Current notions of critical theory fail largely because they insist upon a limited version of immanence. Abnormal discourse may succeed because it can involve a new form of individual revival. Like a genetic mutation, it is immanent in a limited sense. Like a genetic mutation, it is new in a limitless sense.

Abnormal discourse in this (heretical) mutation calls for us to follow the skeptical path disapproved by Unger.[157] It becomes a *grand refus*. The reservation which this new vision of heresy seeks to add to our current discourse is neither agnostic nor is it tacked onto an unreformed practice. It is filled with and inspired by a vision of revival and salvation. Redemption, not disbelief, is its motivating source. Nor is it resigned. It is not resigned because it neither seeks nor claims universality. It presupposes that the "mainstream" congregation of critical scholars will continue to seek a coherent critique. It presupposes at least some form of solidarity in the concrete practice for progressive reform, even in its quantitive, incremental manifestation. Heresy presupposes orthodoxy. At the same time, it seeks to avoid capture by this orthodoxy, either in its critical manifestations or its liberal hegemony. Abnormal discourse, as mutated heresy, has as its simple goal the constant questioning of all practice while hope is maintained. The moment of decadence in liberal scholarship has arrived. Heresy ensures that such decadence does not capture criticism.

This vision of moral terrorism may appear to approach dangerously close to the nihilism it seeks to avoid. The danger is not unreal. Nonetheless, it is only by unveiling the horror of existence and squarely facing the abyss that we can avoid it. The appearance of nihilism becomes at once fascinating and horrifying. Only by maintaining a heretical passion for desire can we overcome the vertigo of resignation. The position of abnormal discourse is not one of resigned pessimism. It is born of a hope for redemption. Its apparent cynicism is simply the means by which it avoids recap-

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Moral terrorism is a strategy for *praxis* by a limited number of well-meaning intellectuals with limited goals. It is a highly personalized attempt to bring street theater to the workplace. It allows us to vent our rage in a (de)constructive manner, thereby preserving our sanity and fervor for first-level struggle.

157. "Precisely because of its extremism, the scorched-earth campaign of radical skepticism is also ineffective: it allows us to tack an agnostic reservation onto an unreformed practice." R. UNGER, *supra* note 113, at 46.

ture and maintains its position of distrust.[158]

The community of scholars which shares the intuition that a larger, socialist hermeneutic framework remains not only possible but essential must now set to work defining and justifying the values which are to constitute its point of reference. The problem with liberalism is that its theory is incoherent while its practice remains powerful and pervasive. The problem with critical thought is that it lacks *praxis*.

What cannot be denied is that the moment of decadence in legal scholarship, both liberal and critical, has arrived. The pall has been lifted. Decadence is neither fatal nor determinative. A greater revelation—and with it, perhaps, redemption—await.

The vision of abnormal discourse remains one of enlightenment and liberation. These goals must be of our own creation, we can expect nothing from the hierarchical he-God of liberalism. One enlightened social critic has already provided our credo; it is for us to concretize it with desire.

> Most people think great god will come from sky/ take away everything, make everybody feel high/ but if you know what life is worth/ you will look for yours here on earth/ now you see the light, you stand up for your rights.
>
> —*Bob Marley*

158. In reality this is a call for the return of the carnival in everyday life. *See supra* note 97. Kristeva opines that "Carnival . . . does not keep to the rigid, that is, moral position of apocalyptic inspiration; it trangresses it, sets its repressed against it—the lower things, sexual matters, what is blasphemous and to which it holds while mocking the law." J. KRISTEVA, *supra* note 151, at 205.